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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,

Petitioner,

v.

LELIA MARIE TASSIN, WIFE OF/AND IRVING C. TASSIN, JR., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of Louisiana, Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Did petitioner waive the argument of preemption where it did not properly raise it in the trial court?

II. Whether the petitioner has presented any compelling reasons to grant its petition where there are no conflicts between state courts of last resort, between federal appellate courts or between a state court of last resort and a federal appellate court; where there are no important issues of federal law that have not been decided by this court but should be; and where there is no federal preemption under the law and the facts of this case.

III. Whether the petitioner's writ application should be denied where the trial court made the correct determination under the law based on her evaluation of the credibility of the witnesses and the qualifications of the experts following a lengthy trial.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

COUNTER-STATEMENT OF THE CASE 2

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI 5

REASONS FOR DENYING THE WRIT 6

A. THE STATE DID NOT PRESERVE A PREEMPTION DEFENSE IN THE LOWER COURTS 6

B. THERE IS NO FEDERAL LAW PREEMPTION IN THIS CASE 7

C. THE DECISIONS OF THE LOUISIANA COURTS WERE CORRECT 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Aucoin v. State Through Department of Transportation and Development, 712 So.2d 62 (La. 1998).....9

Cooper v. Borden, 30,292, 707 So.2d 898 (La. App. 2 Cir. 1998) 6

Dill v. State Dept. of Transportation and Development, 545 So.2d 994 (La. 1989).....9

Lundeen v. Canadian Pacific Railway Company, 07-1656, 532 F.3d 682 (8th Cir. 2008) 10

Norfolk Southern Railway Company v. Shanklin, 529 U.S. 344, 120 S.Ct. 1467, 146 L. Ed. 2d 374 (2000).....9

Snearl v. Mercer, 780 So.2d 563 (La. App. 1 Cir. 2001).....6

Wingfield v. State, through La DOTD, 2001-CA-2668, 835 So.2d 785 (La. App. 1 Cir. 2002), writ denied, 845 So.2d 1060 (La. 5/30/03); WC denied, 540 U.S. 950, 124 S.Ct. 419, 157 L. Ed. 2d 282, No. 03-346 (10/14/03) 8, 9

Wyeth v. Levine, 06-1249 (March 4, 2009) 2009 WL 529172.....7

Youngblood v. West Virginia, 547 U.S. 867 (2006).....5

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND OTHER AUTHORITIES

23 U.S.C. § 101 8

49 U.S.C. § 2016 10

RULES OF THE UNITED STATES SUPREME COURT

Rule 10, Consideration Governing Review on Certiorari.....5

INTRODUCTION

The granting of petitioner's application for a writ is neither necessary nor appropriate in this case. The petitioner attempts to expand the doctrine of preemption into a field and in a setting in which it has never been applied by this Court or by any Court to the knowledge of respondents. Highway defect cases have always been held to be a State matter to be determined under the State's tort law.

Here, three Louisiana courts, the Civil District Court for Orleans Parish, the Louisiana Fourth Circuit Court of Appeal, and the Louisiana Supreme Court, found that the State was partially at fault for this accident under Louisiana law. Their findings were correct and nothing in the federal law preempts or prevents their decisions. Petitioner presents no compelling reasons for this Court to grant the Petition for Writ of Certiorari.

The statutory law and this Court's existing decisions provide adequate guidance to lower courts on the issues in this case. No conflicts have arisen among the State courts or among the circuits. The writ application does not raise any new or novel questions of law. Thus, there is no reason to grant the writ application in this case.

The numerous deaths and injuries in this case could have been prevented had the State taken any one of several practical steps to eliminate what they recognized as an "area of concern". Respondents' experts testified about several simple steps that the

State could have taken to eliminate the danger and prevent the tragedy that occurred in this case. They could have chosen the correct roadside barrier. They could have placed culverts and filled in the ravine around the golf cart path. They could simply have relocated or redesigned the golf cart path.

The trial court correctly credited the testimony of plaintiffs' experts whose expertise has been recognized by the State. The trial court also correctly discounted the testimony of petitioner's experts which was tainted by errors and omissions.

COUNTER-STATEMENT OF THE CASE

This case involves a catastrophic bus accident in New Orleans, Louisiana which caused the deaths of 22 passengers and severe injuries to 21 others. At the location of the accident, I-610 spans over a golf cart path which is part of the city park golf course. Running under the interstate, the golf path presents a dangerous man made ravine with steep banks on each side. A hazardous situation is created in this location where the interstate runs through the golf course and over the dangerous ravine created by the golf path. The State itself recognized this dangerous situation as an "area of concern" in their design documents.

As found by both the Louisiana trial and appellate courts, the decisions made by the Louisiana DOTD in traversing the golf path created a very

dangerous condition which the DOTD recognized as an "area of concern". Petitioner's own expert admitted this was a dangerous non-traversable hazard. The testimony established that there were simple and cost effective solutions which would have eliminated the danger of this "area of concern". The State nevertheless failed to take any action at all to remedy this situation and opted for leaving the area as a danger and a hazard to motorists.

Not long after the start of the trip, the Custom Bus Charter's bus, driven by Frank Bedell gradually left the roadway. The eyewitness testimony of Mr. Messore who was traveling behind and passing the bus as it went through the guardrail put the speed of the bus at approximately 50 to 60 miles per hour.

His wife, Mrs. Messore, had a similar estimate, stating that the vehicle they were traveling in (which was overtaking the bus) was at a speed of approximately 60 to 70 miles per hour. Sgt. Mack with the NOPD testified that evidence was consistent with a speed of about 50 to 60 miles per hour. Plaintiff's expert, Ric Robinette, testified that based upon his reconstruction and the eyewitness testimony, the speed of the bus was between a low of approximately 40 mph and a high of approximately 60 mph. The speed estimate of petitioner's expert, Brian McHenry, was discounted by the trial court because it was based on calculations which failed to take into account the deformation or crushing of the bus upon impact and because it was at odds with the other expert and eye witness testimony. Indeed, Mr. McHenry, on cross

examination, stated that everything he did was on two CD's which were entered into evidence. He admitted on cross that if anything on those CD's were wrong, then his entire opinion was wrong. The calculations on the CD's were shown to be wrong because he did not take the deformity of the bus after the crash into consideration.

The bus did not swerve suddenly and violently into the guardrail. Instead, the path of the bus was described by the eye witnesses as gradual. Mrs. Messore testified that the bus proceeded across all the lanes of traffic and it appeared just like he was going to pull over and stop in the emergency lane. She described the movement of the bus as a "drift over". Mr. Messore similarly described the movement of the bus as "veering off to the right".

Despite the fact that the bus was not speeding and that its movement was a gradual "drift" or "veering off", the undersized guardrail failed to re-direct the bus which then traveled along the State's right of way and went airborne over the golf path and the dangerous ravine it created. It crashed into the steep opposite embankment, leading to the tragic consequences of this case.

The bus had a "very significant frontal impact" on the transverse slope. This resulted in "a tremendous amount of deformation in the inside of the bus".

The bus was crushed and crumpled in the center to the extent that the floor of the bus came very near

to the ceiling and caused the aforesaid injuries and deaths.

The guardrail in question was inadequate to redirect this vehicle away from the dangerous "area of concern" created by the golf cart path. It failed in its primary purpose. Instead of redirecting the bus it allowed the bus to go airborne over the ravine and crash into the opposite embankment. The evidence established that a proper guardrail or barrier would have prevented this accident and the deaths and injuries that occurred. The evidence also established that there were several other practical steps that the State could have taken that would have prevented this tragedy.

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

None of the requirements of this Court's Rule 10 regarding considerations for granting a writ are met in this case.

Pursuant to Rule 10, review via writ of certiorari is a privilege and is not a right. This Court will not grant a writ application absent compelling circumstances. See *Youngblood v. West Virginia*, 547 U.S. 867 (2006).

In this case, there are no conflicting decisions between State courts of last resort, between federal appellate courts, or between a State court of last

resort and a federal appellate court. Moreover, there are no important questions of federal law that have not been decided but should be settled by this Court.

The application for a writ should be denied.

REASONS FOR DENYING THE WRIT

A. THE STATE DID NOT PRESERVE A PREEMPTION DEFENSE IN THE LOWER COURTS

The State, having lost on the merits in all three lower courts, now turns to a preemption argument. However, this argument is unpersuasive and is contrary to the law and jurisprudence. The law of this State is crystal clear that Louisiana tort law principles govern this matter. Federal law does not preempt the State tort law in this case for several reasons.

First, the appellate courts of Louisiana have held that where preemption is not specifically pled as an affirmative defense in the Answer, *and* brought to the trial court's attention that it will not be considered by the appellate court. *Snearl v. Mercer*, 780 So.2d 563, 572 (La. App. 1 Cir. 2001); *Cooper v. Borden*, 30,292, 707 So.2d 898 (La. App. 2 Cir. 1998).

In *Snearl*, the First Circuit found that in a case where the affirmative defense of preemption was not raised in the Answer and was not the subject of specific motion practice, it was too late for the

petitioner to raise it in its appeal. In the case now before the court, petitioner has not squarely raised the issue of preemption in its answer, in the trial or even explicitly in its appellate brief in the Fourth Circuit. Thus, even if federal law applied and could be said to preempt State law (which it does not as shown below) the petitioner failed to raise the issue of preemption and thereby waived it.

Petitioner should not be allowed to bring up these issues for the first time in the higher discretionary review Courts. The State brought up no Supremacy clause arguments nor any "conflict preemption" arguments in the trial court or the State court of appeal below. Thus, they waived those arguments.

B. THERE IS NO FEDERAL LAW PREEMPTION IN THIS CASE

Even if the State had properly preserved a preemption defense, their argument still fails. There is no federal law preemption under the facts and the applicable law of this case. The Louisiana Courts reached the correct results. The State itself recognized that this location (where the interstate spanned a golf cart path) was an "area of concern".

As shown by the recent United States Supreme Court case of *Wyeth v. Levine*, 06-1249, (March 4, 2009) 2009 WL 529172, a doctrine that should only be

invoked pursuant to clear Congressional mandate. There is no such mandate in this case. Congress never intended to preempt State tort law in this field.

Moreover, the Louisiana Courts have consistently held that preemption does not apply in cases involving highway design. *Wingfield v. State, through La. DOTD*, 2001-CA-2668, 835 So.2d 785 (La. App. 1 Cir. 2002), writ denied, 845 So.2d 1060, 2003-0349 (La. 5/30/03); WC denied, 540 U.S. 950, 124 S.Ct. 419, 157 L. Ed. 2d 282, No. 03-346 (10/14/03).

The *Wingfield* case involved a tractor trailer accident on the interstate near the Baton Rouge bridge where the truck rolled over a highway ramp railing when entering a sharp curve landing on the highway below. A jury in the district court found that the site was unreasonably dangerous because of defective design and had inadequate warning signs. DOTD was held 54% at fault in relation to the driver.

The preemption issue was raised in *Wingfield* all the way to this Court. The facts and issues in that case are very similar to those in the instant case. In *Wingfield,* the Louisiana appellate court said that "Tort law falls within the traditional power of the state to protect its citizens" and found that 23 U.S.C. § 101, et seq. did not preempt State law causes of action for accidents resulting from highway design. The Louisiana Supreme Court and this Court denied a writ. DOTD now tries to make the same preemption

argument 6 years later. However, they fail to mention the *Wingfield* case at all in their writ application.

The arguments put forward by the State are in direct contradiction of the holdings of Louisiana Courts in the cases of *Dill v. State Dept. of Transportation and Development*, 545 So.2d 994 (La. 1989); and *Aucoin v. State Through Department of Transportation and Development*, 712 So.2d 62 (La. 1998).

Dill and *Aucoin* both stand for the proposition that Louisiana Courts are not limited by the guidelines although such guidelines can be facts in the courts' determination. There is simply no authority, statutory or jurisprudential for imposing federal law preemption over this State's well thought out and well established tort law in this case. Louisiana's tort law was properly applied in this case.

There is nothing unconstitutional about the Courts of Louisiana applying Louisiana's tort law concepts. No federal law prevents it. Moreover, there is no federal law which is at odds with the decision of the trial Court. The State admitted as much in its brief in the Louisiana Courts, stating ". . . federal laws do not preempt Louisiana tort law causes of action." (State's writ application to the Louisiana Supreme Court, p. vii). That statement is correct. Federal law does not preempt this area. The State's writ application should be denied.

The only case cited by the petitioner in its entire writ application is *Norfolk Southern Railway Company v. Shanklin*, 529 U.S. 344, 120 S.Ct. 1467,

146 L. Ed. 2d 374 (2000). However, that case is clearly distinguishable from this one. That was a railroad case and dealt with an entirely different statutory and regulatory scheme. This case does not deal with railroads in any way and deals with an area which has always traditionally been a State tort law matter. Principles of comity weigh heavily against any findings of preemption. Moreover, there is no congressional or even regulatory language which in any way would authorize a preemption finding in this case.

It should also be noted that, even in railroad cases, Congress has amended 49 U.S.C. § 2016 to clarify that State tort law is not preempted in many instances. The Eighth Circuit's decision in *Lundeen v. Canadian Pacific Railway Company*, 07-1656, 532 F.3d 682 (8th Cir. 2008) reviewed the history of preemption in railroad cases. That decision and the congressional amendments to Section 2016 indicate that preemption should not be found absent clear congressional intent. There is no such intent in this case.

C. THE DECISIONS OF THE LOUISIANA COURTS WERE CORRECT

The Louisiana courts decided this case properly. There are simply no federal considerations that would prompt this Court to grant a writ. This Court should deny the State's writ application. After many years of discovery and pre-trial procedure, the trial court held 13 days of trial. Judge Ledet heard first

hand from the fact witnesses and the expert witnesses and she viewed first hand the evidence presented by both sides. Her decision that the State was 50% at fault was correct and should not be disturbed. The Fourth Circuit, after extensive briefing and full oral argument, properly affirmed the trial court. The Louisiana Supreme Court denied the State's writ application.

The petitioner's arguments are without merit. The lower courts correctly applied Louisiana tort law to this case and properly found that the State breached its duty of care. The State's writ application should be denied.

The trial court correctly weighed the credibility of the witnesses, both fact and expert. The experts who testified for plaintiff were all highly qualified. Plaintiffs' expert, Ric Robinette, has worked extensively for the State as an expert witness. The Fourth Circuit correctly upheld the trial court's determinations regarding the testimony of the expert witnesses who testified for both sides.

The trial court, the Fourth Circuit and the Louisiana Supreme Court, correctly found that the golf cart path and the interstate highway and shoulder in this area were unreasonably dangerous. The State recognized that this was an "area of concern" on the 1988 design documents by the LOTD which was submitted into evidence. Petitioner's expert, Mr. Robertson, admitted it was due to a perceived need and a decision was made to keep the golf cart path.

He characterized the area as a non-traversable hazard to all vehicles which had the potential to cause severe injury if impacted. Mr. Robertson admitted that it was foreseeable that vehicles would run off the road at that location and the purpose of a guardrail is to redirect vehicles and prevent impact with obstacles. The barrier was undersized for the area it was intended to protect.

Art Barrow, plaintiffs' expert, testified that the State did not act as a competent engineer and that the design created an unreasonable risk of harm and was therefore defective. Mr. Barrow opined that the State could have extended the culvert and covered it or relocated it or redesigned it. They chose not to. The determinations of the trial court and the Fourth Circuit were eminently right.

The trial court and the Fourth Circuit properly apportioned fault at 50% to Frank Bedell and 50% to the State. The Louisiana Supreme Court properly denied a writ. These determinations were well within the fault apportionment in similar cases and are well supported by the facts of this case.

There is no preemption in this case. The State never properly presented a preemption argument in the Courts below and thus did not preserve the issue for this Court. Moreover, this is not a case in which preemption is applicable. This is a matter of traditional State law and was properly decided by the

State Courts. The Louisiana Courts reached the right decision.

CONCLUSION

For all the foregoing reasons discussed herein, the Petition for Writ of Certiorari should be denied. The Louisiana courts reached the correct decision. The State failed to timely bring up their preemption argument and there is no federal law preemption under the facts of this case.

The 43 people who were killed and/or injured as a result of this "area of concern" were predominately elderly people who were on a Mother's Day bus trip. For these people, justice delayed is truly justice denied. Some who survived the accident have passed away in the 9+ years since it occurred. Many of the remaining passengers are ill and most are elderly. petitioner's writ application should be denied.

Respectfully submitted,

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